IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. 90-8126

LEON EARLY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Petitioner, Leon Early, pursuant to Rule 39.1, Rules of the Supreme Court, and 18 U.S.C. §3006 A(d)(6), asks leave to filed the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis. The Federal Public Defender Office was appointed to represent the defendant in the district court.

DATED this 23rd day of May, 1991.

Respectfully Submitted,

April R. Ferguson
Assistant Federal Public Defender
Court-Appointed Attorney for
Defendant/Appellant,
Leon Early
Suite 410, 100 North Main Building
Memphis, Tennessee 38103

52

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. ~~90-8126~~

LEON EARLY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should the clarifying amendment to Section 3C1.1 of the United States Sentencing Commission Guidelines, which amendment became effective on November 1, 1990, be applicable to the defendant's sentence pronounced on December 8, 1989; and if so, did the district court commit error by imposing the two point enhancement under Section 3C1.1?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Other Authorities

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LEON EARLY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, Leon Early, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered February 27, 1991, and April 12, 1991, copies of which are attached herewith.

OPINION BELOW

The Court of Appeals for the Sixth Circuit entered its opinion affirming the judgment of the district court on February 27, 1991. The petitioner filed a petition for rehearing with suggestion for rehearing en banc, which the Court of Appeals denied on April 12, 1991. A copy of the opinion, United States vs. Early, 90-5168 (6th Cir., 2/27/91), and order denying the petition for rehearing are annexed in the appendix.

JURISDICTION

On February 27, 1991, the Court of Appeals for the Sixth Circuit entered its ruling affirming the district court. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28 U.S.C. §1254.

STATUTES INVOLVED

The petition for writ of certiorari involves the application of Section 3C1.1 of the United States Sentencing Commission Guidelines, and Application Note 3(d) thereto, which are set out in the petition.

STATEMENT OF THE CASE

On January 19, 1989, the Federal Grand Jury for the Western District of Tennessee, sitting in Memphis, returned an indictment charging the defendant and a co-defendant, Timothy Ware, with aiding and abetting one another in the possession with intent to distribute 19.3 grams of cocaine base, in violation of Title 21 U.S.C. §841(a)(1) and Title 18 U.S.C. §2.

Upon the not guilty plea of the defendant, a jury trial commenced on June 14, 1989, and was recessed until June 19, 1989. The trial continued through June 21, at which time the jury acquitted the co-defendant, Timothy Ware, but was unable to reach a verdict as to Leon Early. The district court declared a mistrial as to Mr. Early, and his case was reset to August 28, 1989.

The defendant was retried, beginning August 28, 1989, and on August 29, the jury returned its verdict of guilty. A presentence report was prepared, and on December 8, 1989, the court sentenced the defendant to one hundred ten months imprisonment, followed by four years of supervised release. The court's Judgment Including Sentence Under the Sentencing Reform Act was entered January 5, 1990, and the defendant filed a timely Notice of Appeal on January 12.

The Court of Appeals for the Sixth Circuit affirmed the district court judgment on February 27, 1991. The defendant filed a petition for rehearing with suggestion en banc, and the petition was denied on April 12, 1991.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

Issue: Should the clarifying amendment to Section 3C1.1 of the United States Sentencing Commission Guidelines, which amendment became effective on November 1, 1990, be applicable to the defendant's sentence pronounced on December 8, 1989; and if so, did the district court commit error by imposing the two point enhancement under Section 3C1.1.

Relevant Facts

The Court of Appeals' opinion of February 27, 1991, pages 1-2, gives the salient facts on the issue in the present petition:

> Memphis Police Officers, Don Lewis and his partner, arrived at an apartment complex in response to a radio dispatcher's call indicating that a drug sale was in progress. Officer Lewis testified that he saw defendant and two other males on second-story balcony and that, as he watched, defendant and the others exchanged money for an indiscernible object. Lewis said the defendant "tossed" a small bag "over the balcony" when he saw the officers approach. After defendant had been apprehended, Lewis retrieved the small sandwich bag which he said defendant "threw off the porch." It contained crack cocaine.

The presentence prepared by the probation office made the following recommendation in reliance on Section 3C1.1 of the Sentencing Guidelines, "Willfully Obstructing or Impeding Proceedings:"

> ...Since the defendant attempted to disassociate himself, or otherwise remove himself from the material evidence by tossing the bag of controlled substance to the ground when officers approached, 2 points are added for obstruction of justice.

The defendant objected to the imposition of this two point enhancement on his base offense level, but the trial court adopted the recommendation of the presentence report. The Court of Appeals in its February 27, 1991, opinion held the trial court did not err in its conclusion "that defendant threw the bag of cocaine from the balcony in a calculated and willful attempt to conceal it from the police." (page 4 of opinion).

This appeal was briefed and argued prior to the amendment to Section 3C1.1, effective November 1, 1990. This section and Application Note 3(d) read:

> §3C1.1 Obstruction or Impeding the Administration of Justice If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.
>
> Application Notes:
>
> 3. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:
>
> ... (d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;...

The defendant filed a timely petition for rehearing with

suggestion en banc in which he argued that the November, 1990 amendment to Section 3C1.1, clarified the meaning of the 1989 guideline and should therefore apply to his sentence. The Court of Appeals denied the petition on April 12, commenting that "the issues raised in the petition were fully considered upon the original submission and decision of the case."

Argument

The Court of Appeals opinion, pages 2-3, correctly notes that Section 3C1.1 of the Sentencing Guidelines, effective November 1, 1989, states that "[t]he following conduct, while not exclusive, may provide a basis for applying this adjustment:... (a) destroying or concealing material evidence, or attempting to do so." (reference to Application Note 1[a]). On page 3 of its opinion, the court relied upon United States vs. Cain, 881 F.2d 980, 982 (11th Cir. 1989), and United States vs. Galvan-Garcia, 872 F.2d 638, 639-41 (5th Cir. 1989), in holding that the two point enhancement for obstruction of justice should apply. Cain and Galvin-Garcia were both decided prior to the November 1, 1990 amendment to Section 3C1.1.

Amendment 347, Appendix C, page C.193 of the United States Sentencing Commission Guidelines Manual, incorporating guideline amendments effective November 1, 1990, notes that the amendment, among other things, "clarifies the operation of §3C1.1." The Eleventh Circuit has commented on the Sentencing Commission's amendments to the guidelines:

> Since originally promulgated in October, 1987, the commentary to the guidelines has been amended several times. Such amendments no doubt will continue to be made at frequent intervals as the Sentencing Commission responds to ambiguities and interpretive problems discovered by the federal courts in applying the guidelines to the facts of particular cases. In most cases, we note that these amendments do not effect a substantive change, but rather are intended only to clarify the rule adopted by a particular guideline. Such amendments thus constitute strongly persuasive evidence of how the Sentencing Commission originally envisioned that the courts would apply the guidelines. We therefore consider such clarifying amendments to the guidelines' commentary in interpreting the guidelines, even with regard to offenders convicted of offenses occurred before the effective date of the amendments. [emphasis added]

United States vs. Scroggins, 880 F.2d 1204, 1215 (11th Cir. 1989). The various circuits have recognized that clarifying amendments should be given substantial weight in determining the meaning of the existing guidelines. United States vs. Luster, 889 F.2d 1523, 1529 (6th Cir. 1989), United States vs. Ofchinick, 877 F.2d 251, 257, n.9, (3rd Cir. 1989), United States vs. Deigert, 916 F.2d 916, 917 (4th Cir. 1990), and United States vs. Irvin, 906 F.2d 1424, 1427 (10th Cir. 1990).

The court should sentence the defendant in accordance with the guidelines in effect at the time of sentencing. United States vs. Russell, 913 F.2d 1288, 1291 (8th Cir. 1990), citing Title 18 U.S.C. §3553(a)(4) and §3553(b). There is a conflict among the circuits whether clarifying amendments, including the November 1, 1990 amendment to Section 3C1.1, apply to sentences pronounced before the amendments. United States vs. Coleman, 928 F.2d 1133 (6th Cir., 3/21/91) (unpublished), United States vs.

Jackson, 924 F.2d 1059 (6th Cir., 2/1/91) (unpublished), and United States vs. Dortsch, 923 F.2d 629, 632, fn. 2 (8th Cir. 1991), hold that the November, 1990 amendment to Section 3C1.1, Application Note 3(d), is inapplicable to sentencings prior to November 1, 1990.

Other circuits have recognized that clarifying amendments may be appropriate to consider, even though the amendment "was not effective at the time of sentencing for the offense in question." United States vs. Nissen, 928 F.2d 690 (5th Cir. 1991), citing United States vs. Aguilera-Zapata, 901 F.2d 1209, 1213-14 (5th Cir. 1990). In United States vs. Fiala, 929 F.2d 285 (10th Cir. 1991), the court relied upon Application Notes 3(g) and 4 to Section 3C1.1, as amended November 1, 1990, to reverse the trial court's two point enhancement for obstruction of justice, noting:

> Although the Commentary amendments technically do not apply to Fiala, we believe it proper to consider them in our interpretation of §3C1.1 (which was not itself amended), and we see no reason to ignore such help from the Sentencing Commission in our attempt to give meaning to the less substantive pre-1990 commentary.

A very similar result is found in United States vs. Urbanek, No. 90-3242 (10th Cir., 4/23/91), 1991 U.S. App. LEXIS 6938, where the court, relying upon Application Note 3(g), rejected the two point enhancement because it was "undisputed" that the defendant's false statements "did not significantly impede or obstruct the investigation." Also see United States vs. Sanchez, 928 F.2d 1450 (6th Cir. 1991), in which the court, seemingly contrary to

the unpublished opinions in United States vs. Jackson, supra, and United States vs. Coleman, supra, applied Application Note 4 of Section 3C1.1, effective November 1, 1990, even though the court recognized that the district court "did not have the benefit of the more refined interpretation of §3C1.1 provided by the Sentencing Commission in the amended commentary...."

United States vs. Perdomo, 927 F.2d 111, 116 (2nd Cir. 1991), found that the November, 1990 clarifying amendment to Section 3B1.1(b) precluded any interpretation of the word "offense" not including uncharged conduct. Even though the amendment was not in effect at sentencing and the meaning thereof was "not reflected in prior case law," the court held that "prior to the November 1990 amendments the Guidelines did link the determination of role in the offense to relevant conduct outside the offense of conviction."

The Sentencing Guidelines are to be interpreted as if they were a statute or court rule, United States vs. Smith, 900 F.2d 1442, 1446 (10th Cir. 1990), and they have the force of law, United States vs. Nottingham, 898 F.2d 390, 393 (3rd Cir. 1990); each citing Mistretta vs. United States, 488 U.S. 361, 109 S.Ct. 647, 664-65. A new rule of law is to be applied retroactively if the court declares that the defendant was punished for an act which a statute does not make criminal. Callahan vs. United States, 881 F.2d 229, 231-32 (6th Cir. 1989), citing Davis vs. United States, 417 U.S. 333, 94 S.Ct. 2298 (1974). See United States vs. Shelton, 848 F.2d 1485, 1489-90 (10th Cir. 1988).

The evidence is undisputed that the defendant's alleged discarding of the crack cocaine did not impede the investigation in any respect. The drugs were retrieved by the police officer immediately after the defendant's apprehension. Section 3C1.1 of the Guidelines, as explained in the clarifying Application Note 3(d), effective November 1, 1990, was never intended to apply to an actual or attempted concealment or destruction of evidence not resulting in a material hindrance to a criminal investigation. The amendment revealed the original intent of the Sentencing Commission, United States vs. Perdomo, supra, 927 F.2d at 116; and the defendant submits that the two point enhancement was imposed upon the defendant in contravention of the intent of Section 3C1.1. The clarifying amendment should therefore preclude the increased sentence imposed upon the defendant. Davis vs. United States, supra.

CONCLUSION

The Sixth Circuit's decision conflicts with those in other circuits, as set forth herein, and the present petition presents an important issue of law which has not been decided by this Honorable Court. The Sentencing Guidelines are frequently amended, and the petitioner submits that the guidance of this Court is needed to clarify the manner in which the amendments should be applied. Wherefore, pursuant to Rule 10.1(a) and (c), the petitioner Leon Early respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

DATED: May 23rd, 1991.

Respectfully Submitted,

April R. Ferguson
Assistant Federal Defender
Court-Appointed Counsel for
Petitioner Leon Early
Suite 410, 100 North Main Bldg.
Memphis, Tennessee 38103
(901) 544-3895; FTS 222-3895

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

LEON EARLY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, April R. Ferguson, a member of the Bar of this Court, certify that pursuant to Rule 29, I have served the Motion for Leave to Proceed in Forma Pauperis and the Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit on counsel for the respondent by enclosing a copy thereof, postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, and depositing same in the mails at Memphis, Tennessee, and further certify that all parties required to be served have been served.

This 23rd day of May, 1991.

April R. Ferguson
Court Appointed Counsel for
Petitioner

APPENDIX

1. Copy of Court of Appeals opinion in United States vs. Early, No. 90-5168 (6th Cir., 2/27/91).

2. Copy of the order of Court of Appeals denying defendant's Petition for Rehearing With Suggestion for Rehearing En Banc, filed April 12, 1991.

3. Copy of United States vs. Coleman, No. 90-6065 (6th Cir., 3/21/91) (unpublished).

4. Copy of United States vs. Jackson, No. 90-1609 (6th Cir., 2/1/91) (unpublished)

5. Copy of United States vs. Urbanek, No. 90-3242 (10th Cir., 4/23/91).

FILED

FEB 27 1991

LEONARD GREEN, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 90-5168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEON EARLY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE.

Decided and Filed _____

_____

BEFORE: NELSON and NORRIS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge. Defendant, Leon Early, appeals his conviction and sentencing for aiding and abetting a codefendant in the possession of cocaine with intent to distribute. Defendant challenges the district court's decision to add two points to his guidelines sentence score for attempting to obstruct justice by throwing a bag of cocaine off a balcony as arresting officers approached. In addition, he challenges the sufficiency of the evidence to support the guilty verdict, and questions the trial judge's refusal to reread certain testimony to the jury.

BACKGROUND

Memphis Police Officers, Don Lewis and his partner, arrived at an apartment complex in response to a radio dispatcher's call indicating that a drug sale was in progress. Officer Lewis testified that he saw defendant and two other males on a second-story balcony and that, as he watched, defendant and the others exchanged

money for an indiscernible object. Lewis said that defendant "tossed" a small bag "over the balcony" when he saw the officers approach. After defendant had been apprehended, Lewis retrieved the small ziplock sandwich bag which he said defendant "threw off the porch." It contained crack cocaine.

Just before the jury began its deliberations, two jurors sent the trial judge notes inquiring as to certain facts of the case. In response to one request, defense counsel asked that testimony be reread to the jury in order to clarify what counsel referred to as a mischaracterization of the facts by the prosecution during closing argument. The judge denied defense counsel's proposal saying that lifting testimony out of context at this time could prove confusing to the jury. Instead, she advised members of the jury to rely upon their own recollection of the case, even if it were to conflict with a lawyer's statement of the facts.

DISCUSSION

The most difficult question raised by the appeal is whether defendant's conduct, in throwing the cocaine off the balcony as officers approached, can be characterized as an obstruction of justice for sentencing purposes.

Section 3C1.1 of the Sentencing Guidelines is entitled "Willfully Obstructing or Impeding Proceedings" and provides that "[i]f the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels." United States Sentencing Commission, *Guidelines Manual*, § 3C1.1 (Nov. 1989). According to the commentary, "this section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the disposition of criminal charges, in respect to the instant offense." *Id.* One of the application notes says that "[t]he following conduct, while not exclusive, may provide a

basis for applying this adjustment: . . . (a) destroying or concealing material evidence, or attempting to do so." *Id.*

Defendant argues that, while section 3C1.1 of the guidelines may be intended to cover overt acts of destruction of evidence, it does not apply to an attempt to disassociate one's self from evidence by merely dropping it, since that may be spontaneous, as opposed to willful, conduct. He likens the conduct to spontaneous flight, which he says could not qualify as obstruction of justice under the guidelines. Indeed, several courts have held that the mere act of instinctive flight to avoid apprehension does not amount to obstruction of justice. *See United States v. Stroud*, 893 F.2d 504, 507 (1st Cir. 1990); *see also United States v. Garcia*, 909 F.2d 389, 392 (9th Cir. 1990).

On the other hand, the government argues that the district court properly assessed the two points for obstruction of justice and cites two recent court opinions as supporting that position. In the first, the Court of Appeals for the Eleventh Circuit held that a defendant who removed his cap containing stolen social security checks and threw it under a parked vehicle when approached by a postal inspector, was properly assessed a two-level increase for obstruction of justice. *United States v. Cain*, 881 F.2d 980, 982 (11th Cir. 1989). And, the Fifth Circuit in *United States v. Galvan-Garcia*, 872 F.2d 638, 639-41 (5th Cir.), *cert. denied*, 107 L. Ed. 2d 122 (1989), held that the trial court appropriately applied the enhancement where the defendant attempted to conceal evidence by tossing bags of marijuana out of the window of his vehicle as he fled from border patrol agents.

In appeals from guideline sentencing, we are to "accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e); *see also United States v. Williams*, 894 F.2d 208, 213-14 (6th Cir. 1990). Surely, under some circumstances, the act of throwing evidence can amount to a willful attempt to conceal the evidence. Under other circumstances, it might not. The facts underlying the two

cases cited above are examples of the former, while lobbing a bag of crack at a police officer as he approaches might illustrate the latter. Here, defendant did not merely drop the bag at his feet. Whether what he actually did amounted to a willful attempt to conceal the bag is a question of fact and, on appeal, its resolution is subject to the clearly erroneous standard of review. There is no need for us to determine whether throwing evidence away is analogous to instinctive flight and whether such flight can amount to obstruction of justice, since the issue before us can be resolved by reference to specific language in the application notes about "concealing material evidence". The notes do not furnish specific language to which one may refer when measuring the effect of flight. Upon the evidence, then, and with reference to the appropriate standard of review, it was not error for the district judge to conclude that defendant threw the bag of cocaine from the balcony in a calculated and willful attempt to conceal it from the police.

Defendant's next contention is that the district court erred in denying his motion for judgment of acquittal, since he claims there was insufficient evidence to support a conviction. However, in view of his failure to have renewed his motion for acquittal at the close of all the evidence, defendant waived any objection to the denial of his earlier motion for acquittal. *United States v. Faymore*, 736 F.2d 328, 334 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984).

Defendant next argues that the district court erred in refusing to read certain testimony in response to requests from two individual jurors. The requests came before deliberations began. The first juror asked who had taken a camera case and whether the officers had testified on that point. The second asked for specific testimony regarding automobile repair costs.

In the course of discussing the requests with counsel, the district judge commented that

> [t]hey need to calm down and talk about the case for a while. . . .

> Obviously, there was proof in the record about that [the camera case], but it is up to him to remember what it was but not for me to tell him what I recall it to be.
>
> ....
>
> ... My general rule is this. If it is as clear as you say, the jurors will remember it that way. I will give them an instruction that if the lawyers recollection of it differs from theirs, they are to be guided by their own recollection.
>
> ....
>
> . . .[T]here is no reason that fairness requires singling out a particular part of the testimony and having them consider it. . . . I can think of only the rarest circumstances in which it would be appropriate for a judge in response to jury questions to have the court reporter start reading out little bits and pieces of proof.
>
> ....
>
> ... This jury hasn't even begun to work. These are two questions from two individual jurors who believe their own recollection about something may be faulty. . . . [W]e are not going to start reading testimony at this point.

The standard for reviewing a district court's decision about reading testimony to the jury is abuse of discretion. *United States v. Padin*, 787 F.2d 1071, 1076 (6th Cir.), *cert. denied*, 479 U.S. 823 (1986). The court in *Padin* listed the two factors which control consideration of a request to have testimony read to the jury: the reasonableness of the request and the difficulty of complying with it. *Id.* In that opinion, we noted "two inherent dangers in reading testimony to a jury during its deliberations. First, undue emphasis may be accorded such testimony. . . . Second, the limited testimony that is reviewed may be taken out of context by the jury." *Id.*

Because the trial judge appropriately responded to the requests from the two jurors, no error has been demonstrated.

CONCLUSION

Defendant's conviction and sentence are **affirmed.**

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By _____
Deputy Clerk

MANDATE ISSUED: 4/18/91

COSTS TAXED: NONE

FILED
APR 12 1991
LEONARD GREEN, Clerk

No. 90-5168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LEON EARLY, Defendant-Appellant	ORDER

BEFORE: NELSON and NORRIS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

NOT FOR PUBLICATION

No. 90-6065

FILED

MAR 21 1991

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BILLY W. COLEMAN, Defendant-Appellant.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

BEFORE: MARTIN and MILBURN, Circuit Judges; and WELLFORD, Senior Circuit Judge.

PER CURIAM. Defendant-appellant Billy Wayne Coleman timely appeals the judgment of conviction and sentence entered after a jury convicted him of possession of cocaine base and cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). For the reasons that follow, we affirm.

I.

Prior to trial, defendant moved to suppress incriminating statements allegedly made by him at the time of his arrest. The following facts come from testimony at the suppression hearing.

After Memphis police officers Bibbs and Thweatt made a controlled purchase of cocaine from the defendant through an informant at the Royal Oaks Motel in Memphis, Tennessee, the officers arranged for defendant to learn that they were en route to his motel room. Defendant fled the room accompanied by a female friend later identified as Terri Bowens. Defendant was stopped after a short, high-speed chase, during which a yellow bag was seen flying from the passenger window of the vehicle defendant was driving. Officer Bibbs used some force to subdue defendant as he was still trying to escape after exiting the vehicle. Officer Thweatt took the female passenger into custody.

After subduing defendant, Officer Bibbs found the yellow bag, and it was full of drugs. While Officer Bibbs was taking photographs of the drugs, and before he informed defendant that he was under arrest or advised defendant of his Miranda rights, defendant blurted out: "[Terri Bowens] didn't know nothing [sic] about it. It was all mine." As defendant was not being interrogated, the statement was not in response to questioning.

Defendant was transported to the police station and advised of his rights. After that, he reiterated that the drugs were his and that the girl was not involved. Defendant eventually persuaded the police to set the girl free; however, defendant refused to make a written statement.

Both defendant and Ms. Bowens claim that they left the motel because of a call from the front desk advising them that it was time to check out. Defendant and Bowens also claim that they were mistreated by the police after they were stopped. Defendant was supposedly kicked in the ribs and struck in the ear with a gun, and Ms. Bowens was supposedly "snatched" out the window of the vehicle and thrown to the curb.

A suppression hearing concerning defendant's oral statements was held before a magistrate, and the magistrate rejected defendant's and Ms. Bowens' testimony finding it less credible than the testimony of Officer Bibbs. The magistrate concluded that there was "no police conduct or overreaching which coerced defendant Billy Wayne Coleman into giving his oral confession." Instead, "[d]efendant has his own personal motive (to obtain the release of his girl friend) for giving these [sic] statement, and thus, it is submitted, the statements were not coerced." The district

court adopted the magistrate's report and recommendation and added:

> [T]o the extent that the magistrate's report does not cover the issue of voluntariness of the statements made by defendant Coleman, as defendant contends, the court finds that the statements made were voluntarily [sic]. Defendant's statements were freely blurted out, not given in response to questioning and were not made under any type of threat of force or reprisal.

Thus, the district court denied the motion to suppress.

After defendant's conviction by a jury, the district court held a sentencing hearing in which it adopted the findings of fact set forth in the presentence report and concluded that a two-point enhancement of defendant's offense level was appropriate under section 3C1.1 of the guidelines. The court explained:

> [T]he proof was quite clear at this trial that the drugs did belong to Mr. Coleman and that there was no criminal involvement on behalf . . . of his companion in the car. Thus, while there is no direct proof as to who threw the drugs from the vehicle, there is evidence, circumstantial evidence from which the Court can conclude that the drugs were either thrown by Mr. Coleman or if not thrown by him, that he procured or caused them to be thrown. And under those circumstances, the Court believes that the two-point enhancement is warranted.
>
> There is developing case law also that indicates that flight in and of

> itself is not enough to impose the obstruction of justice enhancement. . . . [W]ithout finding that flight alone in this case amounts to obstruction of justice, the Court would note that Mr. Coleman was, in fact, the individual who was fleeing by driving his vehicle at a high rate of speed in trying to elude apprehension. And under those circumstances, that is just additional evidence that supports his involvement in attempting to get rid of the drugs.

The principal issues presented in this appeal are (1) whether the district court erred in failing to grant defendant's motion to suppress his incriminating statements, and (2) whether the district court erred in granting a two-point enhancement for obstruction of justice on the basis that defendant attempted to conceal or destroy material evidence during a high-speed chase.

II.

A. The Statements

The district court's factual findings made in consideration of the motion to suppress evidence must be upheld unless they are clearly erroneous. United States v. Coleman, 628 F.2d 961, 963 (6th Cir. 1980). However, the ultimate question of the voluntariness of an incriminating statement is a mixed question of fact and law subject to de novo review. See United States v. Murphy, 763 F.2d 202, 206 (6th Cir. 1985), cert. denied, 474 U.S. 1063 (1986).

Defendant contends that his violent arrest and the violent treatment of his female companion overcame his free will. Citing United States v. Brown, 557 F.2d 541 (6th Cir. 1977) (hostile arrest inflicting extensive injury in presence of 15 to 30 officers followed by confession in back of patrol car where prisoner was seen crying, screaming, and thrashing about), and United States v. Murphy, 763 F.2d 202, 205-06 (6th Cir. 1985) (confession made during attack by police dog which inflicted severe wounds), cert. denied, 474 U.S. 1063 (1986), defendant argues that the focus should not be on whether there was police misconduct but on the state of mind of the person who makes the incriminating statement.

The government correctly points out that the credibility determinations and other factual findings below show that defendant's arrest was not as violent as he would lead the court to believe. Moreover, the findings below cast strong doubt on whether Ms. Bowens was treated harshly. Even if Bowens was snatched from the window of the automobile, the totality of the circumstances, being in the early morning hours after a high-speed chase and without contemporaneous interrogation, confirms the finding that the defendant's statements were "not made under any type of threat of force or reprisal." Thus, Brown and Murphy are distinguishable from this case on the facts as found by the district court.

Moreover, to the extent Brown and Murphy allow a finding of involuntariness without police overreaching, they have been limited by the Supreme Court's holding in Colorado v. Connelly, 479 U.S. 157 (1986). In that case, the Supreme Court made it clear that coercive police activity is a necessary predicate to finding that a confession is involuntary. The Court also made it clear that "[t]he voluntariness of a waiver of [the Fifth Amendment] privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." Connelly, 479 U.S. at 170. It should also be noted that in Murphy we interpreted Townsend v. Sain, 372 U.S. 293 (1963), as a case showing that a statement could be involuntary even in the absence of police misconduct. Murphy, 763 F.2d at 208. However, the Supreme Court interpreted Townsend as involving an "integral element of police overreaching." Connelly, 479 U.S. at 164.

The proper analysis in this circuit for testing the voluntariness of a confession is found in McCall v. Dutton, 863 F.2d 454, 459 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989):

> The test for voluntariness of a confession involves three factors. Threshold to the determination that a confession was "involuntary" for due process purposes is the requirement that the police "extorted [the confession] from the accused by means of coercive

> activity." Once it is established that the police activity was objectively coercive, it is necessary to examine petitioner's subjective state of mind to determine whether the "coercion" in question was sufficient to overbear the will of the accused. Finally, petitioner must prove that his will was overborne because of the coercive police activity in question. If the police misconduct at issue was not the "crucial motivating factor" behind petitioner's decision to confess, the confession may not be suppressed.

Id. (citations omitted).

Under the analysis set forth in Dutton, the police activity in this case was not objectively coercive. Under the circumstances, the police were justified in promptly bringing the suspects under control. Although force was used, at least against defendant, there is no evidence to indicate that it was used as a threat or promise or in conjunction with any activity that the officers should have known was reasonably likely to produce a confession.

Even assuming arguendo that the force was objectively coercive, we hold that the force was not sufficient to overbear the defendant's will. The fact that the statements were not given in response to questioning strongly weighs in favor of finding voluntariness. See Murphy, 763 F.2d at 207. The force was not used in conjunction with questioning, and it was not so great or prolonged as to inflict severe injury or generate fear

sufficient to overcome defendant's will. Cf. Murphy, 763 F.2d at 204 (severe dog bites); Brown, 557 F.2d at 553 ("extensive" injuries to defendant's face, etc.). Defendant's ability to maintain his resolve against giving a written statement also weighs in favor of finding that his statements were voluntarily made. See Dutton, 863 F.2d at 460. Moreover, the assertions that fear overcame defendant's will are suspect since defendant repeated his incriminating statements when he and Ms. Bowens were in the relative safety of the police station far away from the scene of the alleged "violent arrest."

B. Sentencing

The parties agree that the district court's factual findings underlying sentencing must be supported by a preponderance of the evidence, see United States v. Waiton, 908 F.2d 1289, 1301 (6th Cir.), cert. denied, 111 S. Ct. 530 (1990), and that those findings will not be overturned unless they are clearly erroneous. United States v. Ransbottom, 914 F.2d 743, 747 (6th Cir.), cert. denied, 111 S. Ct. 439 (1990). Defendant, however, argues that there was not a preponderance of evidence to show that he threw the drugs from the vehicle or caused them to be thrown. Defendant argues that his companion's innocence shows only that the "odds" favored the possibility that he threw the drugs or had them thrown. This argument, if

carried to its logical conclusion, would completely undercut the use of circumstantial evidence.

The preponderance of evidence standard only requires that a factual finding be based upon evidence that makes the existence of the fact "more likely than not." Walton, 908 F.2d at 1302. Given that it is clear that the drugs were the defendant's and that he was willing to engage in a high-speed flight from the police to avoid being caught, it is more probable than not that defendant threw his drugs from the window or caused them to be thrown. Thus, the district court's finding in this regard is supported by the preponderance of the evidence and is not clearly erroneous.

Defendant's next argument is that even if he did throw the drugs from the window, this act does not rise to the level of obstruction of justice for the purpose of enhancing his sentence under section 3C1.1 of the guidelines. The version of section 3C1.1 in effect at the time of defendant's sentencing provides, in relevant part:

> If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

Application notes to that section state that "destroying or concealing material evidence, or . . . directing or

procuring another person to destroy or conceal material evidence, or attempting to do so," may provide a basis for the enhancement.

Defendant relies heavily upon a November 1990 amendment to section 3C1.1 which he contends shows the enhancement was not intended to apply to conduct such as his. We are not persuaded by defendant's reliance upon the post-sentencing amendments. This case involves more than flight alone; it involves an attempt to dispose of drugs during the context of a high-speed chase. It is not at all clear that enhancement would be improper with this combination of factors even under the amended version. See United States v. Hagan, 913 F.2d 1278 (7th Cir. 1990) (pre-amendment case recognizing that mere flight from arrest was insufficient for enhancement but was sufficient when combined with other obstructive behavior); Id. at 1284 n.6 (noting that under amended version high-speed flight can justify enhancement for reckless endangerment).

At any rate, under the guidelines "in effect on the date the defendant [was] sentenced," 18 U.S.C. § 3553(a)(4), defendant's attempt to dispose of the drugs (by his own actions or by directing another) in combination with the high-speed chase was sufficient to invoke the enhancement. See, e.g., United States v. Jackson, No. 90-1609 (6th Cir. Feb. 1, 1991) (unpublished opinion) (attempt

to throw bags of cocaine into the toilet as police entered home); United States v. Dortch, 923 F.2d 629 (8th Cir. 1991) (tossing cocaine out the window of a vehicle without an attempt to flee); United States v. Galvan-Garcia, 872 F.2d 638, 641 (5th Cir.) (tossing bags of drugs out of window of vehicle during high-speed chase), cert. denied, 110 S. Ct. 164 (1989). Accordingly, we find no error in the enhancement of defendant's sentence for obstruction of justice.

III.

For the reasons stated, the judgment of the district court is AFFIRMED.

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By _____
Deputy Clerk

ISSUED AS MANDATE: April 15, 1991
COSTS: None

1991 U.S. App. LEXIS 1757 printed in FULL format.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES JACKSON, Defendant-Appellant

No. 90-1609

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1991 U.S. App. LEXIS 1757

February 1, 1991, Filed

NOTICE: [*1]

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported as Table Case at 924 F.2d 1059. 1991 U.S. App. LEXIS 6499.

PRIOR HISTORY:

On Appeal from the United States District Court for the Eastern District of Michigan: No. 89-80433: Hackett, Judge.

JUDGES: Nelson and Ryan, Circuit Judges: and Edwards, Senior Circuit Judge.

OPINIONBY: RYAN

OPINION: Defendant-appellant James Jackson appeals from his conviction of possession of cocaine and heroin with intent to distribute, 21 U.S.C. @ 841, and possession or use of a firearm during a drug trafficking crime, 18 U.S.C. @ 924(c). He also appeals his sentence of 211 months imprisonment. The following issues are before us on appeal:

. Whether the district court properly found that sufficient probable cause justified the search of Jackson's residence and that the affidavit did not contain false information;

. Whether the district court erred in its instruction to the jury on the charge of possession of a firearm in connection with a narcotics crime:

. Whether the district [*2] court erred in sentencing Jackson on the basis of possession with intent to distribute in excess of 50 grams of cocaine base:

. Whether the district court erred in adding two points under the sentencing guidelines for obstruction of justice: and

. Whether the prosecutor's comments during closing arguments resulted in manifest injustice and thus warrant reversal.

We conclude that the district court properly decided all of the issues and thus affirm.

I.

On June 21, 1989, agents of the Drug Enforcement Agency and officers of the Detroit Police Department conducted a search warrant raid at Jackson's home in Detroit. When the police entered, Jackson tried to throw several plastic bags toward an open toilet but missed his target. The officers arrested Jackson and seized the plastic bags and their contents as evidence. The police then searched the rest of the house where they found a number of plastic bags containing an off-white substance, packaging materials, razor blades, and rubber bands in the basement and small coin envelopes containing a white substance in the hall closet. The agents also discovered ammunition and a number of weapons throughout the house: an inoperable handgun [*3] in the basement tool chest, two pistols in the upstairs bedroom, two unloaded pistols behind the bed, and a semi-automatic rifle and a twelve gage shotgun in the bedroom closet.

Jackson was charged with possession with intent to distribute cocaine and heroin in counts I and II of the indictment, and possession of a firearm in relation to a drug offense in count III.

Jackson filed a motion to suppress the drugs and arms found during the search and, on January 26, 1990, the court held an evidentiary hearing on this motion. The defense argued that the evidence should be suppressed because the search warrant affiant, Officer Gerard Biernacki, presented false information in the warrant and because the warrant did not establish probable cause to search. The court denied the motion, finding that although there was some discrepancy in the testimony, the affidavit's information was accurate.

At trial, expert testimony revealed that the powdery substance found at Jackson's house was 51.47 grams of 87% cocaine base, commonly known as crack, and that the substance found in the basement was .32 grams of crack cocaine. The small coin envelopes found in the hall closet contained 1.86 grams of heroin. [*4]

The jury convicted Jackson on all three counts. Because the total net weight of the cocaine exceeded 50 grams of cocaine base, the district court sentenced Jackson pursuant to the mandatory ten-year minimum of 18 U.S.C. @ 841(b)(iii). The court also adjusted the sentence two points upward under sentencing guideline @ 3C1.1 for obstruction of justice because Jackson had tried to destroy evidence. Jackson was sentenced to 211 months imprisonment.

II.

A. Warrant

Jackson asks the Sixth Circuit to reverse the district court's holding that the affidavit supporting the search warrant did not contain deliberately false information and that sufficient probable cause existed to issue the warrant. In reviewing this contention, the Sixth Circuit must uphold the district court unless its findings were clearly erroneous. United States v. Barone, 584 F.2d 118, 122 (6th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

The warrant to search Jackson's home was based on the affidavit of Officer Gerard Biernacki and the statement of a confidential informant, Reginald Edwards. who Biernacki interviewed on June 10. Edwards gave the following written statement:

D. What were you doing in the car [*5] w/the 3/B/M's at I-75 Serv. Dr. + Oakman?

A. They were taking me back to my Mom's house after they beat me up and cut me up because they said I stole $ 140.00 from their house on Lantz. x Reginald Edwards.

D. What time and date did the beating and cutting start?

A. 4:30 a.m. today, 6-10-89, at my auntie's house on Hershey, they put a gun to my head, Andre had the gun and they told my aunt to to leave the house x Reginald Edwards.

D. After they beat/cut you up what happened?

A. After "Dural" the guy w/the baseball hat on and the driver of the Blk T-Bird, took me over to a house by 7 Mile & Southfield, near a Kentucky Fried Chicken, and he picked up the other two guys The guy w/the baseball cap put 3 guns in the car He got the guns from the house on Lantz Street, he sells dope there too. And I know his other houses too x Reginald.

D. You have been advised of your rights and make this statement freely?

A. Yes I have x Reginald Edwards.

At the suppression hearing, Biernacki testified that Edwards' statement was interrupted by the arrival of Emergency Medical Service (EMS) technicians to treat Edwards. After EMS left, Biernacki spoke further with Edwards but did not record [*6] the statement. Edwards' oral statement forms the basis for most of the affidavit's information. Biernacki made the following affidavit on June 20, 1989:

On June 8, 1989, Sgt. Arthur McNamara and his crew, from the Detroit Police Department Narcotics Section, executed a Search Warrant for the premises of 480 Lantz, which is located in City of Detroit Michigan. At this time a small amount of suspected crack cocaine was seized from the premises.

On June 10, 1989, your affiant met with a confidential informant (CI-1) [later identified as Edwards] who advised the affiant that 480 Lantz was a "Crack House" where some of the local people who sell narcotics in the area of Seven Mile and Woodward, Detroit Michigan, go and hide from the police. The CI-1 also advised the affiant that a grey K-car was being used to transport the narcotics from a [sic] unknown location on the west side of the city, which the CI-1 could point out as he had been taken there on June 10, 1989, where he observed a person known to him as Durell take a briefcase with narcotics proceeds, U.S. currency, into that location.

On June 13, 1989 the affiant with other members of the task force were in the

area of 480 Lantz [*7] and at this time observed a grey K-car 1989 Michigan lic. #291 XYR parked in front of 480 Lantz and the vehicle was occupied by a [sic] unknown Black/Female. Affiant and crew then followed the K-car 291 XYR to 19313 Mark Twain Detroit, Michigan, where the driver was observed to exit and enter 19133 [sic] Mark Tawin.

On June 13, 1989, affiant met with CI-1 at which time placed the CI-1 in a [sic] undercover vehicle and asked the CI-1 to show affiant where the west side location was located.

The CI-1 then directed the affiant directly to the 19313 Mark Twain address and after seeing the K-car 291 XYR parked in the drive stated to affiant that it was the car that the CI-1 had referred to on June 10, 1989.

On June 13, 1989 a search warrant for the premises of 19199 Hershey, Detroit Michigan was obtained from information provided by CI-1 and 2 persons were arrested as a result of this information. This search warrant was obtained by Lt. William Presley of the Detroit Police Department, Homicide Section.

On June 18, 1989, Police Officer Allan Smith of the Detroit Police Department, Homicide Section, with a crew, set up a surveillance of 19313 Mark Twain. On this date the crew observed [*8] a [sic] unknown black female enter the K-car 291 XYR, and proceed directly to 480 Lantz, where the black female entered for a short period of time and then exit and return directly to 19313 Mark Twain and entered from view.

On June 19, 1989 Sgt. Arthur McNamara and crew set up a surveillance of 19313 Mark Twain where he observed a [sic] unknown black female and two black males exit 19313 Mark Twain and enter the K-car 291 XYR, and again drive directly to 480 Lantz where the black female exited same and entered the Lantz address, for a short period of time and again exit and re-enter the K-car. They then drove to a address on East State Fair, where the black female then again exited the car and also entered that address from view. After a short period of time she exited the house and entered the K-car and drove directly back to 19313 Mark Twain where all persons then exited and re-entered the house from view.

Affiant's knowledge of the narcotics trade indicates that weapons and/or explosives or incendiary devices are commonly used in connection therewith: that monies or other assets derived from the trade are often found at the sites of narcotics related search warrants executions: [*9] and that records relating to narcotics transactions or hiding of proceeds from such transactions are commonly kept in the course of illegal drug trafficking, and likewise frequently found at the sites of search warrant executions.

At the suppression hearing, the defense challenged the affidavit because of the discrepancies between the written statement and the affidavit, particularly the information set forth in the second paragraph of Biernacki's affidavit. The testimony of Edwards failed to corroborate the exact times and dates involved; Edwards also did not recall giving an oral statement to Biernacki or giving him the address on Lantz. The defense also offered the testimony of Basim El-Amin who claimed that the car observed by police was Jackson's Chrysler LeBaron, but Jackson had loaned it to him on the days in question and that Basim had neither loaned the car to anyone nor driven it to the surveillance location himself. The testimony at the hearing failed to establish whose car it was and whether the license plates on the car at the time were those involved in the offense. The

defense, then, failed to link the Chrysler LeBaron to the car observed by the surveillance team.

The [*10] court denied the motion to suppress. The court found that the discrepancies between Biernacki's and Edwards' memories could be attributable to the severe injuries which Edwards had sustained that night. The court also noted that Edwards did not deny telling Biernacki the information in the affidavit; he simply disputed the time.

Although there were discrepancies in the testimony, we cannot say the court clearly erred. The court had the opportunity to observe the witnesses' demeanor. Although the court does not specifically say that she based her decision on credibility determinations, she must have believed Officer Biernacki and her determination, based on actually hearing and viewing his testimony, should not be set aside lightly. 18 U.S.C. @ 3742(e).

The defense also argues that the court erred by applying the wrong standard. The court, in ruling from the bench, commented that the defense had not met its "heavy burden". The defense believes that the court, by referring to a "heavy burden", applied the clear and convincing evidence standard, not the preponderance of the evidence standard appropriate to these cases. See United States v. Bennett, 905 F.2d 931 (6th Cir. 1990). The [*11] court, however, expressly stated that it was using the preponderance of the evidence standard. Moreover, in Bennett, the Sixth Circuit, in commenting on the defendant's burden in challenging the truthfulness of a search warrant affidavit, noted that the defendant in such a case "has a heavy burden". Id. at 934. In light of this recent statement by our circuit, it does not seem that the lower court erred in calling the burden a heavy one.

The defendant also challenges the court's decision because the affidavit did not provide the police with probable cause to search. A magistrate's probable cause finding must be based on the "totality of the circumstances" surrounding the affidavit. Illinois v. Gates, 462 U.S. 213 (1983). As the court explained in Gates:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence will be found in a particular place. And the duty of the reviewing court is simply to insure that the magistrate [*12] had a "substantial basis for concluding" that probable cause existed.

Id. at 238-39. The magistrate's determination of probable cause "should be paid great deference by reviewing courts." Id. at 236 (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)). Subjecting the magistrate's finding to "hypertechnical" examination would violate the strong public policy favoring searches pursuant to a warrant; invalidating the warrant on hypertechnical grounds would discourage officers from obtaining warrants before searching. Id.

Having found that the statements in the affidavit were not intentionally misleading nor untruthful, the district court could easily conclude that the magistrate had a "substantial basis for concluding" that probable cause existed. In order to establish probable cause, the affidavit must link the residence to be searched with the evidence sought. United States v. Freeman, 685 F.2d 942

(5th Cir. 1982). In this case, the affidavit indicated that drug activities had occurred in the house and that a search should produce drugs, arms and the proceeds of drug sales. The totality of the circumstances indicate that the affidavit established probable [*13] cause. Unlike the anonymous tip in Gates, Biernacki spoke with his informant personally and learned that Edwards knew about the activities at Jackson's home from personal observation. Edwards' reliability was also proven by the prior arrests of two others based on his information about drug activities. The Court in Gates expressly noted that an informant's prior reliable information about a particular type of crime in the community diminished the need for a thorough basis of knowledge. Id. at 233. The police department's surveillance also lent credibility to Edwards' information by confirming the suspicious activities of the gray K-car which travelled repeatedly between a known "crack house" and the defendant's home. Such corroboration also decreases the need to rely on the informant's credibility in making a common sense probable cause determination. Id. at 244. Although the sweeping generalization at the end of the affidavit that weapons are usually found where drug trafficking occurs may not provide the necessary link between the house and the contraband, the officers' observations and Edwards' statement suffice to show that drug trafficking was occurring at Jackson's [*14] home and that a search would produce drugs and drug proceeds.

Finally, the defendant asserts that the good faith exception of United States v. Leon, 468 U.S. 897 (1984), should not be used to validate the search as the magistrate abandoned his detached and neutral role in making the probable cause finding and because no reasonable police officer could have believed that they had probable cause to search. Having found that probable cause existed, we need not reach this issue.

B. Firearm Charge

Jackson was convicted under 18 U.S.C. @ 924(c)(1) which provides: "Whoever, during and in relation to any crime of violence or drug trafficking crime. . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years. . . ." 18 U.S.C. @ 924(c)(1). The relevant count of the indictment charged that Jackson: ". . . during and in relation to a drug trafficking crime, that is, possession with intent to distribute controlled substances, used and possessed firearms; in violation of Section 924(d), Title 18, United States Code." In the jury instructions, the district court described [*15] the proof necessary for a conviction under this statute:

> That the individual was involved in the distribution of a controlled substance.
>
> That he knowingly used a firearm in order to protect the controlled substance.
>
> For the offense charged in Count Three, the defendant is considered to have used a firearm if its presence in his possession in any manner facilitated the carrying out of the offense charged in count one or Count Two (sic), possession with intent to distribute controlled substances.
>
> It is not necessary that the firearms be displayed or fired in order that it may be considered as having been used.

The defendant has used a firearm if it was an integral part of the criminal undertaking and its availability increased the likelihood that the criminal undertaking would succeed.

If a firearm is available to protect controlled substances, then it is used in a drug trafficking crime.

Jackson challenges his conviction on this count because the court erred by improperly amending the indictment by its instruction to the jury and by applying the "drug fortress theory" when the weapons were not readily accessible fo9 use during the crime. The prosecution contends that the indictment [*16] and the jury instructions conform with this circuit's decisions adopting the "drug fortress theory."

The district court's jury instructions did not completely replicate the indictment: the indictment required that Jackson "use and possess" (emphasis added) the firearm but the jury instructions did not require both use and possession. Jackson argues that this change amounts to a constructive amendment to the indictment. The government argues that this difference is only a variance. A constructive amendment occurs when the variance "creates 'a substantial likelihood' that a defendant may have been 'convicted of an offense other than that charged by the grand jury.'" United States v. Hathaway, 798 F.2d 902, 911 (6th Cir. 1986) (citation omitted). No such danger occurred here because the grand jury indictment specifically indicated that count three amounts to a violation of section 924(c) which requires only use or possession. The district judge's instructions also explained that use or possession suffice. What occurred here looks more like a variance: the charging terms were not changed but the evidence at trial proved facts which differed materially from those alleged in the [*17] indictment. Id. at 910. Because this change amounts to a variance, reversible error occurs only when the defendant shows that the change affected "substantial rights". Id. at 910-11. As Jackson made no such showing, the conviction should not fall on account of the difference between the indictment and the instructions.

Jackson also contends that he should not have been convicted under section 924(c) because although guns were in the house, the only gun he had access to during the offense was the inoperable gun in the basement; he alleges that the gun fortress theory should not apply where the firearms are not accessible during the crime. In making this argument, Jackson cites United States v. Feliz-Cordero, 859 F.2d 250 (2d Cir. 1988) and United States v. Theodoropoulos, 866 F.2d 587 (3rd Cir. 1989). In Feliz-Cordero and Theodoropoulos, the Second and Third Circuits held that the "in relation to" language of section 924(c) requires more than "mere availability": the circumstances must suggest that the defendant intend to and be able to use the firearm during the offense. This, however, has not been the law of the Sixth Circuit. Our circuit, in 1989, expressly [*18] adopted the fortress theory which provides that a defendant may be convicted under section 924(c) when he keeps weapons in the house but does not use or carry them at the time of the offense because "just as weapons are kept at the ready to protect military installations against potential enemy attack, so too may weapons be kept at the ready to protect a drug house, thereby safeguarding and facilitating illegal transactions." United States v. Acosta-Cazares, 878 F.2d 945, 951-52 (6th Cir.), cert. denied, 110 S. Ct. 255 (1989) (citation omitted); see also United States v. Henry, 878 F.2d 937 (6th Cir. 1989). As our circuit recently endorsed the fortress theory, we should affirm the conviction under section 924(c).

C. Application of 21 U.S.C. @ 841(b)(1)(A)(iii)

In sentencing Jackson, the district court imposed a minimum sentence of ten years pursuant to 21 U.S.C. @ 841(b)(1)(A)(iii). This section provides that a person convicted of possession with intent to distribute under section 841(a) must be sentenced to a minimum of ten years where the violation involves "50 grams or more of a mixture or substance which described in clause (ii) contains cocaine base." 21 U.S.C. [*19] @ 841(b)(1)(A)(iii). Clause ii requires a detectable amount of various forms of cocoa leaves, cocaine, and their derivatives. Jackson argues that the district court erred in applying the penalty provision because the total net weight of cocaine seized was under 50 grams. The prosecution argues that the district court did not err because the statute does not require that the 50 grams of cocaine base represent 100% purity.

The mandatory penalty provision of section 841(b) "does not require the violation to involve 50 grams of cocaine base; rather it applies to '50 grams of a mixture or substance [of cocaine] which contains cocaine base.'" United States v. Barnes, 890 F.2d 545, 552 (1st Cir. 1989), cert. denied, 110 S. Ct. 1326 (1990). Although, as Jackson points out, the evidence involved in Barnes, 72.5 grams of 97% pure cocaine base, would meet the requirement of 50 grams of pure cocaine base, the court expressly held that it need not meet this requirement for it to impose the penalty provision. This circuit came to a similar conclusion in a case dealing with LSD. In United States v. Elrod, the Sixth Circuit expressly rejected the purity argument advanced here by defendant [*20] Jackson. United States v. Elrod, 898 F.2d 60 (6th Cir.), cert. denied, 111 S. Ct. 104 (1990). In Elrod, the court found that the 10 gram requirement for LSD was met where the defendant possessed .09 grams of pure LSD and 10 grams of blotter paper. The court explained that the statute's wording "mixture or substance containing a detectable amount" of LSD. See 21 U.S.C. @ 841(b)(1)(A)(v), indicates that the full 10 grams need not be composed of pure LSD. This conclusion was bolstered by contrasting the LSD section with the PCP provision which expressly created a net weight requirement of pure PCP. As Congress clearly knew how to write such a provision, the Sixth Circuit concluded that they did not intend to mandate such a net weight requirement for LSD. Elrod, 898 F.2d at 62. Because the same language is involved in the cocaine base section as the LSD section, we hold that the penalty provision of section 3841(b)(1)(A)(iii) applies regardless of whether the 50 grams involved constitute pure cocaine base.

D. Obstruction of Justice

The district court increased Jackson's offense level by two points because he obstructed justice when he attempted to throw bags of [*21] cocaine into the toilet as the police entered his home. Jackson disagrees with this enhancement because the allegedly obstructive conduct occurred contemporaneously with the arrest. The prosecution argues that under the Guidelines in effect at the time of sentencing, the contemporaneous occurrence of the arrest and obstruction is irrelevant.

The Sentencing Guidelines provide a two point offense level enhancement for defendants who "willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense." U.S.S.G. @ 3C1.1. An example of such conduct listed in the Application Notes is "destroying or concealing material evidence, or

attempting to do so." Application Notes 1(a), U.S.S.G. @ 3C1.1.

Jackson argues that the Amendments which became effective November 1990 support his contention. Amendment 41(3)(d) provides that "if such (obstructive) conduct occurs contemporaneously with arrest . . . it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it results in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing [*22] of the offender." The Sentencing Guidelines in effect when Jackson was sentenced, however, do not include the amendment Jackson quotes. Because no material hindrance occurred when the agents had to walk a few extra feet to retrieve the bags, Jackson argues that the obstructive conduct occurring at the time of arrest does not warrant the increased sentence.

Under the then current provision, obstruction of justice includes conduct during the investigation which ought to include the events leading up to the arrest. The Fifth Circuit agreed with this approach in a factually similar case. In United States v. Galvan-Garcia, the court used section 3C1.1 to increase the offense level of a defendant who threw bags of marijuana out the window during a high speed chase which culminated in their arrest. United States v. Galvan-Garcia, 872 F.2d 622 (5th Cir.), cert. denied, 110 S. Ct. 164 (1989). Because this rule, and not the exclusion of contemporaneous conduct, was the law at the time of sentencing, the district court did not clearly err.

E. Prosecutor's Comments During Closing Arguments

Jackson complains that certain comments made by the prosecutor during his rebuttal argument [*23] deprived Jackson of due process because of their fundamental unfairness. During the closing arguments of Jackson's attorney, Mr. Blank, mentioned that the jury should consider the lesser included offense of simple possession; Mr. Blank also counselled the jury to find Jackson not guilty of all counts. In his rebuttal argument, the prosecutor, Mr. Soisson, in discussing the unlikelihood of Jackson possessing such a large quantity of cocaine, 200 bags, for personal use, stated that "Mr. Blank's (sic) says well maybe just guilty of simple possession of it --." Transcript at 367. Mr. Blank immediately objected that he "did not say that. I said that they have other things to consider. I don't think the prosecution should be saying that I said my client's guilty of --." Id. Mr. Soisson then adopted Mr. Blank's phrase "other things to consider" and continued with his argument. Mr. Soisson took no further action until bringing this argument up on appeal.

Although improper prosecution statements during closing arguments may constitute reversible error, courts rarely reverse for admittedly improper comments. Angel v. Overberg, 682 F.2d 605, 608 (6th Cir. 1982). In fact, the defense [*24] fails to cite one case when the court actually reversed. Such relief is only appropriate when the misconduct denies the defendant a fair trial by permeating the entire atmosphere of the trial. United States v. Vance, 871 F.2d 572, 577 (6th Cir.), cert. denied, 110 S. Ct. 322 (1989). Arguments of prejudice caused by closing arguments must be viewed in the totality of the trial. Donnelly v. De Christoforo, 416 U.S. 637, 645 (1974).

In this case, the prosecutor's remarks could have been interpreted, as the defense contends, as an admission by the defense counsel that Jackson was guilty of simple possession. On the other hand, the jury could have inferred what the prosecution probably intended: that the defense wanted the jury to consider the simple possession charge. When "two plausible interpretations can be given to

a prosecutor's ambiguous final argument, the court should not strive to adopt the one which casts doubt upon the prosecutor's intentions." Angel, 682 F.2d at 608. An appellate court also should not reverse when efforts were made by the district court to mitigate the harm of the statements. Id.; Donnelly, 416 U.S. at 645. In this case, the closing arguments [*25] were prefaced by a reminder from the court that they were not evidence and the prosecutor himself opened his argument with the same reminder. The jury also heard an immediate objection by the defense counsel and a retraction by the prosecutor of the disputed comment. Thus, the jury, after hearing three days worth of arguments and evidence, would be unlikely to focus on the single ambiguous remark which the prosecutor immediately retracted and the court announced was not evidence. See Donnelly, 416 U.S. 637. Although the defense correctly argues that the prosecutor has a special role in criminal trials to ensure that justice is done, we do not believe that the disputed comment, viewed in the totality of the trial, sufficiently prejudiced the defendant to warrant reversal.

III.

For the foregoing reasons, we AFFIRM Jackson's conviction and sentence.

4TH CASE of Level 1 printed in FULL format.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN J. URBANEK, Defendant-Appellant

No. 90-3242

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

1991 U.S. App. LEXIS 6938

April 23, 1991, Filed

PRIOR HISTORY: [*1]

Appeal for the United States District Court for the District of Kansas: D.C. No. 90-40007-01.

COUNSEL: Lee Thompson, United States Attorney, and Tanya J. Treadway, Assistant United States Attorney, Kansas City, Kansas, for Plaintiff-Appellee.

Charles D. Anderson, Federal Public Defender, and Marilyn M. Trubey, Assistant Federal Public Defender, Topeka, Kansas, for Defendant-Appellant.

JUDGES: SEYMOUR, ANDERSON and TACHA, Circuit Judges.

OPINIONBY: ANDERSON

OPINION: After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

John J. Urbanek appeals his sentence imposed pursuant to the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"), contending that the district court erred in adding two points to his offense level pursuant to U.S.S.G. @ 3C1.1 for obstructing the administration of justice.

Mr. Urbanek entered a plea of guilty, and was convicted on five counts of failure to file an income tax return for the years 1983 through 1987, in violation of 26 U.S.C. @ 7203. For purposes of [*2] sentencing, only count V, relating to the year 1987, fell under the Guidelines. As to that count the United States Probation Officer calculated the adjusted offense level to be eight, computed by establishing a base offense level of eight (U.S.S.G. @ 2T1.2/total tax loss of $ 18,111), adjusted upward by two levels for obstruction of justice (U.S.S.G. @ 3C1.1), and downward two levels for acceptance of responsibility (U.S.S.G. @ 3E.1.1(a)). The criminal history category was determined to be III. The resulting sentencing range was six to twelve months, with options of supervised release or probation, a fine not exceeding $ 10,000, and a mandatory special assessment of $ 25. Without the two-level increase for obstruction of justice the offense level would have been six, resulting in a Guideline range of two to eight months, with provisions relating to supervised release, probation, fines and assessments being identical to those for an offense level of eight.

The district court sentenced Mr. Urbanek to five years probation as to counts I through IV, none of which were subject to the Guidelines, with that sentence to run concurrently with the sentence imposed as to count V. An assessment [*3] of $ 25 for each count was also imposed pursuant to 18 U.S.C. @ 3013. As to count V, the district court imposed a sentence under the Guidelines of five years probation subject to special conditions, including a six-month placement in the community corrections component of the Topeka Halfway House, participation in the 30-day intermediate alcohol treatment program, full cooperation with the Internal Revenue Service, and payment of restitution. A $ 25 special assessment was also imposed as to count V. Because of Mr. Urbanek's indigent financial condition no fine was imposed either for failure to file or for costs of incarceration. The district court characterized this sentence as "probably a lenient sentence from the problems that you have caused to other people." R. Vol. III at 23.

Mr. Urbanek's offense level was increased by two levels for obstruction of justice pursuant to U.S.S.G. @ 3C1.1 because of false statements which he made to Internal Revenue Service investigators during an interview. The investigators initiated the interview for the purpose of confronting him with information which the agents had already gleaned from their own investigation of his financial affairs. In response [*4] to the questions, Mr. Urbanek told the investigators that he had not worked and had neither income nor a bank account during the years in which he did not file an income tax return. He also denied receiving income under a business name or alias. Those statements were false. He had substantial income for the years 1983 through 1987, and bank accounts, and had used aliases or business names. Mr. Urbanek also stated that his failure to comply with the tax laws was attributable to an alcohol abuse problem.

None of the false statements made by Mr. Urbanek to the investigators impeded the investigation. Prior to the interview with him the IRS investigators knew that he had worked during the target years, where he had worked, what his income was, his bank account number and location, and the names he had used in his business. When confronted with this evidence, in the same interview in which he had made the false statements, Mr. Urbanek immediately retracted those statements.

Mr. Urbanek argues that his false statements and use of aliases did not amount to obstruction of justice since they were not capable of influencing the investigation and were the equivalent of "flight" or a denial of [*5] guilt. The government responds that a false statement must only have "the potential for obstructing justice." Brief of Appellee at 7 (emphasis in original). The government adds that: "Because Section 3C1.1 includes attempted obstruction of justice as well as actual obstruction of justice, materiality is not connected to whether the authorities' investigation was actually affected or prejudiced." Id. (emphasis in original). In evaluating these arguments, we are mindful that the district court's application of the Sentencing Guidelines to the facts of a particular case is entitled to due deference and its factual findings will not be reversed unless clearly erroneous. U.S.C. @ 3742(e) (1990); United States v. Keys, 899 F.2d 983, 988 (10th Cir.), cert. denied, 111 S.Ct. 160 (1990). However, we will remand for resentencing if the Guidelines were incorrectly applied. 18 U.S.C. @ 3742(f)(1).

Recently the United States Sentencing Commission has added additional Commentary and Application Notes to @ 3C1.1, in order to clarify the operation of the existing Guidelines, rather than to change them. U.S.S.G. App. C, note

347. The Application [*6] Notes state, in pertinent part:

3. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

* * *

(g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

* * *

4. The following is a non-exhaustive list of examples of the types of conduct that, absent a separate count of conviction for such conduct, do not warrant application of this enhancement, but ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range:

(a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

(b) making false statements, not under oath, to law enforcement officers, unless Application Note 3 (g) above applies;

* * *

Commentary, Application Notes 3, 4, U.S.S.G. @ 3C1.1 (emphasis added).

Evaluating the statements made by Mr. Urbanek to the investigators in light of the Application Notes to @ 3C1.1, n1 we [*7] conclude that it was clear error to charge him with a two-level increase for obstruction of justice. The statements which he made denying the existence of bank accounts or taxable income amounted to nothing more than a denial of guilt or an "exculpatory no." Commentary, Application Note 1, U.S.S.G. @ 3C1.1; United States v. Keys, 899 F.2d at 988 (denial of guilt is improper basis for @ 3C1.1 enhancement). Assertion of an alcohol abuse problem as an excuse for failing to file tax returns was a legitimate defense, subject, of course, to proof.

- -Footnotes- - - - - - - - - - - - - - - - - - - -

n1 The Commentaries interpret the Guidelines and explain their application. Failure to follow them in applying the Guidelines may constitute reversible error. U.S.S.G. @ 1B1.7; United States v. Goddard, F.2d (10th Cir. March 27, 1991); United States v. Smith, 900 F.2d 1442, 1447 (10th Cir. 1990).

- -End Footnotes- - - - - - - - - - - - - - - - - - -

Mr. Urbanek's use of aliases to hinder the government in recognizing and establishing the fact that he earned income, and his denial of [*8] the use of aliases, are a more serious matter. Many courts have held that a @ 3C1.1 enhancement is justified when the defendant asserts an alias during an investigation, regardless of whether the prosecution was actually impeded or obstructed. United States v. Gaddy, 909 F.2d 196, 199 (7th Cir. 1990) (false

name to FBI agent, even though recanted two days later); United States v. Irabor, 894 F.2d 554, 556 (2d Cir. 1990) (false identification to investigators); United States v. Patterson, 890 F.2d 69, 71-72 (8th Cir. 1989) (false identification at time of arrest and during investigation); see United States v. Saintil, 910 F.2d 1231, 1233 (4th Cir. 1990). However, those cases differ from the one before us in that Mr. Urbanek did not assert that he was anyone other than himself to the investigator. He simply denied having used any aliases in the past in connection with the crime. As discussed above, that denial of wrongdoing alone is not enough to justify the enhancement. Similarly, his refusal to disclose the names under which he did business is merely a "refusal to admit guilt or to provide information" [*9] and is not meant to justify a @ 3C1.1 enhancement for obstruction of justice. Commentary, Application Note 1, U.S.S.G. @ 3C1.1.

In addition, those cases were decided without the benefit of the recent clarification of the Guidelines. In light of the 1990 Application Notes, even if Mr. Urbanek had given an alias, the enhancement would not be justified since it is undisputed that his false statements did not significantly impede or obstruct the investigation. n2 Commentary, Application Note 3 (g), U.S.S.G. @ 3C1.1. The IRS investigators already had the correct information in their possession when they asked the questions. Furthermore, Mr. Urbanek recanted on the spot when confronted with the truth. Accordingly, no obstruction of the administration of justice occurred within the meaning of U.S.S.G. @ 3C1.1 as a result of Mr. Urbanek's responses to the investigator's questions.

- -Footnotes- - - - - - - - - - - - - - - - - - - -

n2 No cases decided after the 1990 clarification conflict with our holding that actual, significant hindrance to investigation is necessary when false aliases are given, not under oath, during the investigation. United States v. Turpin, 920 F.2d 1377, 1387 (8th Cir. 1990) (defendant's referral to accomplice under his assumed name during trial testimony actually hindered the investigation); United States v. Yerks, 918 F.2d 1371, 1375 (8th Cir. 1990) (where defendant gave an alias at arrest and also signed a financial status affidavit before federal magistrate, actual obstruction not necessary).

- -End Footnotes- - - - - - - - - - - - - - - - - - -

[*10]

The government argues that even if the district court erred by increasing the base offense level under @ 3C1.1, the error was harmless and no remand for resentencing is required because Mr. Urbanek's sentence would have been the same even if the offense level was calculated at six rather than eight. See United States v. Bermingham, 855 F.2d 925, 931 (2d Cir. 1988) (dispute about applicable Guidelines need not be resolved where the sentence falls within either of two arguably applicable Guideline ranges and the same sentence would have been imposed under either guideline range); United States v. White, 875 F.2d 427, 432-33 (4th Cir. 1989) ("Had the district judge stated that the sentence would have been the same regardless of which sentencing range had ultimately been determined to be appropriate, review of whether [the adjustment] applied would have been unnecessary."). However, the government concedes that the district court did not specifically state that Mr. Urbanek's sentence would have been the same with or without the obstruction of justice adjustment. Brief of Appellee at 11. While we view it as highly unlikely that this "lenient" sentence [*11] imposed by the district court will be any different under an offense level of

six rather than an offense level of eight, we cannot agree with the government that no remand is required simply because the sentence imposed was within either of two arguably applicable Guideline ranges. See United States v. Bermingham, 855 F.2d at 934-35. Unless the district court makes it clear during the sentencing proceeding that the sentence would be the same under either of the applicable Guideline ranges, we are compelled to remand for resentencing when we find, as we do here, that an improper offense level was applied. Id.

In consideration of the foregoing, we reverse and remand this case for resentencing consistent with this opinion.